Supreme Court, U. S.
FILED
JUL 17 1980
MICHAEL RODAK, JR., CLERK

No. 79-1717

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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WRITERS GUILD OF AMERICA, WEST, INC., ET AL.,
PETITIONERS

*v.*

AMERICAN BROADCASTING COMPANIES, INC., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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WADE H. MCCREE, JR.
*Solicitor General*
ALICE DANIEL
*Assistant Attorney General*
ROBERT E. KOPP
MARK N. MUTTERPERL
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

ROBERT R. BRUCE
*General Counsel*
*Federal Communications Commission*
*Washington, D.C. 20554*

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### QUESTION PRESENTED

Whether the court of appeals abused its discretion by invoking the doctrine of primary jurisdiction to require preliminary resort to the Federal Communications Commission for determination of questions relating to the Commission's regulatory responsibilities under the Communications Act.

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The opinion of the court of appeals (Pet. App. A–4 to A–39) is reported at 609 F.2d 355. The opinion of the district court (Pet. App. A–40 to A–242) is reported at 423 F. Supp. 1064.

## JURISDICTION

The judgment of the court of appeals was entered on November 14, 1979. A petition for rehearing was denied on January 30, 1980. The petition for a writ of certiorari was filed on April 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case involves the so-called television "family viewing policy," which was adopted in April 1975 by the National Association of Broadcasters ("NAB") as an amendment to its voluntary Television Code.[1] The policy represented an effort to deal with the long-recognized problem of violent and sexually-oriented

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[1] The 1975 Family Viewing Policy read as follows (Pet. App. A–6 n.2):

> Additionally, entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program in this time period is deemed to be inappropriate for such an audience, advisories should be used to alert viewers. Advisories should also be used when programs in later prime time periods contain material that might be disturbing to significant segments of the audience.

broadcasts in the early evening hours of television programming. As the court of appeals noted, "[t]he impact of violent and sexually-oriented television programming was the subject of intense public and congressional concern throughout the two decades preceding the adoption of the family viewing policy* * *" (Pet. App. A–9). In 1974 alone, the Federal Communications Commission received nearly 25,000 complaints about violent and sexually-oriented programs.

In June 1974, the House Appropriations Committee directed the FCC "to submit a report to the Committee by December 31, 1974, outlining specific positive actions taken or planned by the Commission to protect children from excessive programming of violence and obscenity." H.R. Rep. No. 1139, 93d Cong., 2d Sess. 15 (1974). On August 1, 1974, the Senate Appropriations Committee stated that it "joins with the House in urging the Commission to proceed as vigorously and as rapidly as possible—within Constitutional limitations—to determine what is its power in the area of program violence and obscenity, particularly as to

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These advisories should be presented in audio and video form at the beginning of the program and when deemed appropriate at a later point in the program. Advisories should also be used responsibly in promotional material in advance of the program. When using an advisory, the broadcaster should attempt to notify publishers of television program listings.

Special care should be taken with respect to the content and treatment of audience advisories so that they do not disserve their intended purpose by containing material that is promotional, sensational or exploitative. Promotional announcements for programs that include advisories should be scheduled on a basis consistent with the purpose of the advisory.

their effect on children." S. Rep. No. 1056, 93d Cong., 2d Sess. 19 (1974).

After receiving this congressional directive, the then Chairman of the FCC, Richard Wiley, and the members of his staff considered how best to respond. Concerned that formal FCC action might pose complex problems, Chairman Wiley decided to encourage the networks and the NAB to respond to the public outcry over violent and sexually-oriented programs on television by using moral suasion or "jawboning." As the court of appeals noted, "[a] similar use of jawboning earlier had proven successful in inducing industry self-regulation in the area of children's television programming. See *Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977)" (Pet. App. A–11).[2]

Chairman Wiley's approach was to focus the industry's attention on excessive violence and sex on television, explain that the FCC was reluctant for legal and policy reasons to promulgate rules, remind broadcast-

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[2] In *Action for Children's Television* v. *FCC*, 564 F.2d 458, 473 n.27 (1977), the D.C. Circuit confirmed that moral suasion or "jawboning," short of coercion, can be an appropriate regulatory tool:

> If we were to accept the proposition implicit in petitioner's argument—that the FCC may never resort to discussions with members of the industry in a general effort to have its regulatees conform to their public service obligations—the Commission would have little choice but to abandon any reasonable expectation of salutary self-regulation and to affirmatively regulate throughout the areas of children's programming and advertising. The problem, of course, is necessarily a matter of degree, and an agency may well be found to have abused its authority were it to employ overbearing "jawboning" or "armtwisting" tactics.

ers of their responsibilities to the public, and urge improved industry self-regulation. In addition, Chairman Wiley suggested that if self-regulation proved unsuccessful, the FCC would consider an administrative proceeding (Pet. App. A–26 to A–35).

As the court of appeals summarized (Pet. App. A–11): "Chairman Wiley's campaign ultimately involved: (1) five meetings between himself and/or members of the Commission staff and industry representatives at which various proposals for dealing with the problem of televised sex and violence were discussed; (2) three public speeches by Chairman Wiley in which he exhorted the industry to undertake its own action but indicated that unless some action were taken, the government might well be forced to become formally involved with the problem; (3) several telephone conversations between Chairman Wiley and various network executives; and (4) suggestions by Chairman Wiley to various NAB representatives that the NAB expedite its consideration of a proposal for a Code amendment incorporating the family viewing policy."

2. Petitioners—creators, writers, and producers of television programs—brought these consolidated actions in the United States District Court for the Central District of California against the Federal Communications Commission and its commissioners, the three television networks ("ABC", "CBS", and "NBC"), and the National Association of Broadcasters. The complaints challenged the NAB's amended Television Code and, in the words of the court of appeals, "mounted a frontal assault on the manner in which the FCC chose to carry out its statutory mandate to 'gen-

erally encourage the larger and more effective use of radio in the public interest'" (Pet. App. A–12). Petitioners claimed that Chairman Wiley's informal persuasion improperly pressured the networks and the NAB into adopting the family viewing policy; that the FCC's use of these tactics, rather than formal regulation, infringed the First Amendment and Section 326 of the Federal Communications Act, 47 U.S.C. 326; and that the FCC effectively implemented public policy through informal measures and thereby failed to comply with the procedural requirements of the Administrative Procedure Act (Pet. App. A–12). Petitioners sought declaratory and injunctive relief, as well as damages, claiming violations of the First Amendment, the Administrative Procedure Act, the Federal Communications Act, and the Sherman Antitrust Act.

Respondents moved the district court for an order staying judicial proceedings pending administrative consideration by the FCC of the issues raised in the complaints. The district court declined to stay its hand (Pet. App. A–16 to A–17) and entered judgment in favor of petitioners. The district court concluded that (Pet. App. A–7 to A–8): "(1) threats, influence, and pressure by the Chairman of the FCC caused the networks and the NAB to adopt the family viewing policy; (2) the FCC committed a per se violation of the First Amendment by exerting improper pressure on the networks; (3) the FCC violated the Administrative Procedure Act (APA) by implementing public policy by informal pressure instead of by complying with the Act's procedural requirements; (4) the action of the

networks and the NAB constituted 'government action' for purposes of the First Amendment both because adoption of the family viewing policy had been caused substantially by FCC pressure and because the networks, the NAB, and the FCC participated in an 'unprecedented joint venture' in an effort to compromise the independent judgments of other broadcast licensees; and (5) the networks and the NAB violated the First Amendment by 'fail[ing] to exercise independent program judgments and instead becom[ing] surrogates in the enforcement of government policy' and by agreeing to compromise the independent programming judgments of individual broadcast licensees." The district court declined, however, to grant injunctive relief (Pet. App. A–240).

All parties except Tandem Productions appealed.[3] A unanimous panel of the court of appeals, while expressing substantial doubt about the district court's legal analysis (Pet. App. A–14, A–17, A–21), invoked the doctrine of primary jurisdiction to afford the FCC an opportunity in the first instance to consider the issues presented. The court of appeals concluded that "[t]he development of standards governing the agency's use of informal methods to influence broadcast industry policy is an issue 'that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry'" (Pet.

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[3]The district court authorized interlocutory appeals in these consolidated actions—prior to the resolution of all issues before the court and prior to resolution of all claims against the several defendants—pursuant to 28 U.S.C. 1292(b) and Fed. R. Civ. P. 54(b) (Pet. App. A–242). The court of appeals permitted the appeals (Pet. App. A–8).

App. A–24) (citations omitted). The court added that "[d]eferral to the FCC is * * * essential to further the purposes of the delicately balanced system of broadcast regulation" contemplated by Congress under the Federal Communications Act of 1934 (Pet. App. A–24 to A–25). "[S]trongly disagree[ing] with each of" the district court's reasons for refusing to invoke the doctrine of primary jurisdiction (Pet. App. A–17; A–20 to A–25), the court of appeals concluded that "this case raises issues of major significance to the administration of the regulatory scheme pertaining to the broadcast media that properly rest within the primary jurisdiction of the FCC" (Pet. App. A–8 to A–9).

The court of appeals further explained that the district court's "conclusions strike at the very core of the pervasive issue concerning the scope of the FCC's power in regulating broadcasting and put at issue a technique of governing, *viz.*, jawboning, that under one name or another has long been in use in government generally" (Pet. App. A–17). Petitioners' claims, the court observed, pertain to matters that are "of great concern to the FCC and with respect to which it has special competence" *(ibid.)*. The court also stated that "we cannot believe that the ultimate judicial resolution of these issues will not be aided by the FCC's thorough consideration of them. Then, and only then, should courts step with even modest confidence into these sensitive and difficult areas" *(ibid.)*. Accordingly, the court "vacate[d] the judgment of the district court and remand[ed] with instructions to refer plaintiffs' claims against the government defendants to the FCC, and to hold in abeyance plaintiffs' claims against

the private defendants pending resolution and judicial review of the administrative proceedings before the FCC" (Pet. App. A–25).

## ARGUMENT

The decision of the court of appeals, invoking the doctrine of primary jurisdiction to obtain the benefit of the administrative agency's views on the complex regulatory issues raised by the complaints in these actions, is based on legal principles long established by decisions of this Court. The decision below does not conflict with any decision of this Court or any other circuit. Further review by this Court is therefore unwarranted.

1. The primary jurisdiction doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pacific R. R.*, 352 U.S. 59, 63 (1956). The doctrine is a judicially-created tool designed to ensure that courts have the benefit of "the expert and specialized knowledge of the agencies." *Id.* at 64. As this Court explained in *Far East Conference* v. *United States*, 342 U.S. 570, 574–575 (1952):

> [I]n cases raising issues of fact not within the conventional experience of judges * * * agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured,

> and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

This Court has long recognized that "[a]ffording the opportunity for administrative action will 'prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to [these] particular circumstances.'" *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 306 (1973), quoting *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958).

"The principal criterion in deciding whether the doctrine is applicable * * * usually is judicial appraisal of need or lack of need for resort to administrative judgment." K. Davis, *Administrative Law Treatise* § 19.09 (1958). When the expert views of the agency would contribute to an informed decision on complex regulatory questions, the primary jurisdiction doctrine is properly invoked, even if certain issues in the case are beyond the agency's purview and require ultimate resolution by the courts. *Ricci* v. *Chicago Exchange Mercantile*, 409 U.S. 289 (1973). These considerations are particularly apposite here, where the issues to be resolved are fundamental to the Federal Communications Commission's statutory obligation to "encourage" broadcasting in "the public interest." See 47 U.S.C. 303(g).

2. The court of appeals did not abuse its discretion by applying the doctrine of primary jurisdiction in this case. Congress established the FCC to administer "a unified and comprehensive regulatory system for the [broadcast] industry." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). The FCC is the "ultimate arbiter and guardian of the public interest" in television broadcasting (*Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 117 (1973) ), and it enjoys comprehensive statutory authority to discharge that responsibility. See 47 U.S.C. 154(i), 303, 307(a), 307(d), 309(a), 309(h), 310, 312. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 379–380 (1969). For this reason, as this Court has repeatedly held, the judiciary should afford substantial deference to the FCC's views on statutory and First Amendment issues arising in the field of broadcasting. *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting Co.* v. *FCC*, *supra*; *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). In evaluating First Amendment claims in this area, the courts should "afford great weight to the * * * experience of the Commission." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 102.[4]

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[4]The decisions of this Court conclusively reject petitioners' claim (Pet. 12) that "[c]ourts, not regulatory agencies, have historically addressed" First Amendment issues arising in the field of broadcasting. As the D.C. Circuit has observed, "[c]ourts generally prefer to rule upon constitutional questions which involve the scope of power of an administrative agency only after the agency itself has considered the constitutional issue and made a determination about the weights of competing adminis-

Invocation of the primary jurisdiction doctrine is particularly appropriate in light of the issues presented in this case. As the court of appeals recognized (Pet. App. A21–A22), the central questions in this case are whether a family viewing hour imposed by the FCC would contravene the First Amendment and whether Chairman Wiley's undisputed course of conduct crossed the line between legitimate jawboning and improper coercion. Broadcasters do not, of course, enjoy a right to freedom of expression that is absolute, since, in the limited broadcast spectrum, it is "the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390. The Commission has an essential role to play in preserving the decency of broadcasting (*FCC* v. *Pacifica Foundation*, *supra*), and is charged by Congress with a duty to "encourage" use of the airwaves that furthers the "public interest" (47 U.S.C. 303(g)).

The propriety of the Commission's actions here depends in part upon a weighing of the public interest values that Chairman Wiley sought to implement and

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trative policies and interests." *P.A.M. News Corporation* v. *Hardin*, 440 F.2d 255, 257 (1971). See *Community-Service Broadcasting of Mid-America, Inc.* v. *FCC*, 593 F.2d 1102, 1111 n.22 (D.C. Cir. 1978) (discussing earlier remand to FCC to obtain agency views on First Amendment issues raised by petitioners). Because of the contribution that the Commission can make in striking the constitutional balance in the broadcast context, petitioners' arguments for bypassing the agency (Pet. 16–23) are entirely misplaced. We also note that, despite petitioners' assertion that they are entitled to immediate judicial relief, even the district court withheld the injunctive remedy that they sought (Pet. App. A–240).

the values of freedom of expression that petitioners claim were infringed.[5] In addition, petitioners claims cannot be resolved without an examination of the appropriateness of different administrative responses available to the Commission, their statutory foundation, and their relative effectiveness in remedying perceived problems.[6] In this area, a "forecast of the direc-

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[5] Petitioners' First Amendment claims rest on the unusual theory that *advocacy* of *self-regulation* by Chairman Wiley, which resulted in the adoption of voluntary industry standards, is the equivalent of government imposition of restrictions on freedom of speech in violation of the First Amendment. This theory would convert Chairman Wiley's exercise of his right of freedom of expression, and his "encouragement" of broadcasting in the "public interest" (47 U.S.C. 303(g)), into an illegal "prior restraint" (Pet. 16–23). However, as the D.C. Circuit recently observed in *Association of National Advertisers, Inc.* v. *FTC*, No. 79–1117 (Dec. 27, 1979), slip op. 35–36, cert. denied, No. 79–1496 (June 16, 1980): "If an agency official is to be effective he must engage in debate and discussion about the policy matters before him. As this court has recognized before, 'informal contacts between agencies and the public are the 'bread and butter' of the process of administration.'"

[6] No court has ever suggested that Commission jawboning to improve the industry's own standards infringes any constitutional right. See *Action for Children's Television* v. *FCC*, 564 F.2d 458, 473 n.27 (D.C. Cir. 1977). As this Court noted in *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 748, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." The Court explained that "broadcasting is uniquely accessible to children, even those too young to read" (*id.* at 749). These considerations strongly support the Commission's attempt to encourage industry members to broadcast sex and violence-oriented programs at times when children will be less likely to be watching. See *id.* at 750–751: "a 'nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.' We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory powers does not depend on proof that the pig is obscene" (citations omitted).

tion in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).

In determining "whether a family viewing hour" encouraged by FCC actions would contravene the First Amendment (Pet. App. A–21), the reviewing court will be materially aided by the Commission's experience in striking the appropriate balance between public and private control of the broadcast spectrum in light of First Amendment goals and the legislative policy expressed in the Communications Act. Without the agency's explanation why its actions were necessary, why alternative remedies were infeasible, and what statutory grounds support the remedy selected, the court's attempt to pronounce on the propriety of the Commission's actions would be equivalent to "embark[ing] upon a voyage without a compass." *Ford Motor Credit Co.* v. *Milhollin*, No. 78–1487 (Feb. 20, 1980), slip op. 12. The views of the Commission in this case will be essential in determining whether it properly discharged the delicate responsibility described by this Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 102, 117:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its

> chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned.* * *
>
> The regulatory scheme evolved slowly, but very early the licensee's role developed in terms of a "public trustee" * * * In this structure the Commission acts in essence as an "overseer," but the initial and primary responsibility * * * rests with the licensee. This role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

In sum, as the court of appeals correctly concluded (Pet. App. A–19), "[i]nvocation of the primary jurisdiction doctrine provides a needed opportunity to obtain an explicit and well articulated determination by the FCC of whether its actions under Chairman Wiley properly walked the 'tightrope.'"[7]

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[7] As established by the many decisions of this Court applying the doctrine of primary jurisdiction and deferring to administrative interpretations of federal statutes, agencies should not be bypassed simply because a complaint raises statutory or constitutional issues that will ultimately require resolution by the courts. When an informed decision by a court is required on an issue falling within the purview of the expert agency, the proper course is to hold proceedings in abeyance pending the agency's expression of views. Thus, even though petitioners' First Amendment claims are entitled to judicial cognizance, the views of the agency may not be disregarded because the agency is the statutory guardian of the paramount First Amendment rights of television audiences.

3. Petitioners nevertheless contend (Pet. 13) that "reference would be pointless" because the Commission's position is already clear. Petitioners ignore the fact that the Commission, as a collegial body, has never considered the question whether Chairman Wiley's actions went too far or explained the propriety of engaging in "jawboning" to promote public interest values. While the Commission's counsel have taken a position on this question, that is no substitute for the formal analysis and conclusion of the agency itself. See *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168–169 (1962); Pet. App. A–20.[8]

Petitioners also contend (Pet. 13) that referral to the Commission is improper because judicial resolution of the issues involved would present "no problem of interference with a regulatory scheme."[9] That conten-

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[8] Petitioners also argue that it is unseemly to refer the present litigation to the Commission because they seek judicial review of the actions of one of its members (Pet. 10–11). Petitioners overlook Section 405 of the Communications Act, 47 U.S.C. 405, which clearly contemplates that challenges to the validity of previous Commission actions can, and sometimes must, be pursued in the first instance before the agency. Moreover, contrary to petitioners' claim that referral is improper when an agency is charged with illegal actions, courts have remanded cases to the FCC to obtain its views even when extremely serious charges of misconduct have been levied against its members. See, *e.g.*, *WKAT, Inc.* v. *FCC*, 296 F.2d 375 (D.C. Cir.), cert. denied, 368 U.S. 841 (1961); *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959), after remand, 294 F.2d 742 (D.C. Cir.), cert. denied, 376 U.S. 915 (1964); *WORZ, Inc.* v. *FCC*, 268 F.2d 889 (D.C. Cir.) mandamus denied, 361 U.S. 805 (1959), after remand, 323 F.2d 618 (D.C. Cir. 1963), cert. denied, 376 U.S. 914 (1964).

[9] Petitioners base that contention on the view that "[t]he FCC has no statutory warrant to regulate 'programming inappropri-

tion, however, ignores the court of appeals' determination (Pet. App. A–17) that the district court's holding raises issues at the "very core" of the agency's jurisdiction and could undermine the agency's performance of its statutory duties. In short, the district court's decision threatens substantial interference with the broadcasting regulatory scheme—interference that the primary jurisdiction doctrine was designed to avoid.[10]

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ate for viewing by a general family audience'" *(ibid.)* However, as the court of appeals correctly observed, there is substantial doubt as to the validity of that contention. See Pet. App. A–14, A–17 to A–18, A–21 to A–22. The Constitution does not bar "*all* limitations of the power of the individual licensee to determine what he will transmit to the listening and viewing public" (Pet. App. A-21). The Commission's responsibilities under the public interest standard of the Communications Act sometimes include consideration of broadcast programming. See, *e.g.*, *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *Action for Children's Television* v. *FCC*, 564 F.2d 458, 480 (D.C. Cir. 1977); *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). If the district court had sought the Commission's views before reaching its decision, it might have avoided the erroneous conclusion that the FCC has no role to play in determing what type of broadcast programming serves the public interest.

[10]This case is far different from *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959), relied upon by petitioners (Pet. 13). In that case, this Court found no interference with the regulatory scheme and permitted a Sherman Act suit to proceed without invoking the primary jurisdiction doctrine. There was no indication that the antitrust suit touched on questions at "the very core * * * of the FCC's power in regulating broadcasting" (Pet. App. A-17). On the contrary, the Commission had specifically disavowed "either the power or the desire to foreclose" the antitrust action. 358 U.S. at 350 n.18. Thus, in sharp contrast to the present case, there was "no pervasive regulatory scheme * * * to throw out of balance" and "sporadic action by federal courts [could] work no mischief." *Id.* at 350.

Finally, petitioners contend (Pet. 16–26) that Chairman Wiley's "jawboning" was so coercive that it forced the National Association of Broadcasters to adopt the Family Viewing Policy. On this theory, petitioners argue that the government has enforced a substantive standard equivalent to a "rule" without complying with the Administrative Procedure Act. However, that too is a question properly addressed in the first instance by the Commission, which is "especially familiar with the customs and practices of the industry." *Ricci* v. *Chicago Mercantile Exchange*, *supra*, 409 U.S. at 305. The agency's analysis of the freedom of broadcasters, and the effect of communications from the administrative agency, will inform the district court's ultimate analysis of the question whether the adoption of industry standards relating to sex and violence in television broadcasting during early evening hours was the product of "coercion" by the agency or responsible journalistic discretion.[11]

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[11] The Commission's position in the lower courts has been that Chairman Wiley's statements did not "coerce" the broadcasters. Therefore, the standards adopted by the National Association of Broadcasters are not agency "rules" or "regulations" and there is no need for compliance with the Administrative Procedure Act. See 5 U.S.C. 551 (defining "rule" and "order"). See also *Regular Common Carrier Conference* v. *United States*, No. 79-1249 (D.C. Cir. June 30, 1980). The agency's analysis of the difference between substantive rules and informal communications with industry members, and the measure of freedom exercised by industry members in this area, will facilitate the district court's analysis of the "coercion" claim raised by petitioners.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*
ALICE DANIEL
*Assistant Attorney General*
ROBERT E. KOPP
MARK N. MUTTERPERL
*Attorneys*

ROBERT R. BRUCE
*General Counsel*
*Federal Communications Commission*

JULY 1980

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